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No. 02-327

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

STATE OF ALABAMA,
PETITIONER,

VS.

KENNETH EDWARD MOFFITT
RESPONDENT,

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

RESPONDENT'S BRIEF IN RESPONSE TO THE STATES PETITION FOR WRIT OF CERTIORARI

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Pro-Se

13 pp

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STATEMENT OF THE ISSUE

Did the Alabama Supreme Court err in ruling that a police officer did not have probable cause to pursue a fleeing suspect into an apartment because the officer lacked direct evidence - in the form of a statement by a by stander-that the suspect had commited a crime?

STATEMENT OF THE FACTS

On December 12,2000 at a motion to suppress hearing, the following testimony was heard:

The State offered the testimony of Officer Jerry Lynn Watkins. Officer Watkins stated that he was dispatched to Johnson Homes at 3:23 a.m. On a call that shots had been fired in the housing complex. (R.37). They didn't give a specific address to go to they said Johnson Homes 400 Johnson Circle that shots had been. When he arrived, he allegally saw four people standing outside behind the apartments. It appeared that they were arguing. I could hear them yelling at me to stop. And Mr. Moffitt was the one that took off running. I believe it was the female that said that or,no I'm sorry it was the other male that said he had a gun. So I went after him around the building and he ran into the apartment. I had an auxiliary officer with me. I sent the auxiliary around the front because he ran in the back door where the kitchen is. The auxiliary said he tried to go out the front, but saw him and shut the door back so I waited for another officer to get there with me, and we went inside. Officer Watkins stated that he thought Moffitt would probably be pretty dangerous "IF" he was out there shooting (R.39) Watkins stated he had to search the apartment looking for him and his gun. And he searched the kitchen, living room and then the master bedroom that was on the left. (R.39) Officer Watkins stated "yes Ma'am' to the prosecution

after being asked would you say that, at the time you went into that apartment, you were in hot pursuit of the defendant" (P.40) Officer Watkins also stated that "everyone" else" was outside standing around the back door. "everyone else" being Sedina, I believe was her name and her brother Ed. On cross examination when ask who said Kenneth had a gun Officer Watkins stated Ed, "I believe his exact words was there he goes. He's not <u>the</u> gun". (R.41) When he was later ask did he later question Edward Bryant as to why he said Mr. Moffitt had the gun? He said Kenneth told him he had it, but said he never saw it. (P.42) The Officer then went on to discuss issues not dealing with [probable] cause or exigent circumstances.

ARGUMENT

The Alabama Supreme Court's decision of February 22,2002 does not conflict with prior case law.

It is clear that the Alabama Supreme Court's decision is in concert with prior rulings. That Court examined the circumstances and correctly determined that Officer Watkins did not have probable cause to enter the home in question. The Officer had no probable cause to enter the resident because he had no probable cause to suspect that Mr. Moffitt had committed any crime . The Alabama Supreme Courts holding does not change the relevant, test it merely points out the total lack of any evidence of show that Mr. Moffitt may have committed any crime.

The State suggest that the Alabama Supreme Courts opinion conflicts with prior case law: However, the cases cited by the state are distinguishable, and that court's opinion does not conflict with them. The state began its' argument with a citation to Illinios Vs. Gates, 462 U.S. 213 (1983), for the proposition that probable cause for a warrantless search is to be determined by the "Totality of the circumstances" (State brief p.6); However, the Gates opinion involves a search based on a search warrant, not a warrantless search, the Totality test set forth by the United States Supreme Court is for granting or denying search warrants based in part on confidential informants tip. It has absolutely no factual relation to a warrantless search of a home as was the situation in the case at hand,The State's citation and reliance upon this case is misleading and irrelevant. Also quoting Spinelli Vs. United States,393 U.S. 410 (1969) and United States Vs. Edmiston, 46 F.3d 786 (8th Cir. 1995):

Furthermore, in all these cases set out by the State the officer has "personal specific knowledge" to corroborate the informants tip that showed the participation in criminal activity and to provide the necessary trustworthness of the tip. In the case at hand it is important to note that Mr. Moffitt allegedly ran in the back door and the officers had the front and back doors covered (R.38) and that officer Watkins entered the same door minutes later after another officer arrived (R.44) and everyone else was standing around the back door yet he ask no question prior to entering the resident (R.41) although he had time(R.44.),Secondly, the state argues that Alabama Supreme Court's opinion conflicts with Ker Vs. California, 374 U.S. 23 (1963). Also citing Draper Vs.United States, 358 U.S. 307 (1959) and United States Vs. Bell, 933 F.2d 272 (11th. Cir. 1987). These cases too are inapplicable to the case at hand. They deal with the standard for probable cause to make a warrantless arrest they have nothing to do with a warrantless search of a resident; However these cases too are distinguishable and that Courts opinion does not conflict with them, because along with a informant tip the officer had specific personal knowledge of criminal activity which coupled to the tips gave rise of probable cause to arrest. The States quotes from United States Vs. Cortez, 449 U.S. 411,417 (1981), to support its' argument, this case deals with reasonable suspicion to make an inventory search of an automobile the quotation used by the State has nothing to do with the case at hand. This quotation refers to the fact that the officer's was conducting an inventory search based on an abundance of specific articulable

facts from a collection of officers which gave rise to that search. No other officer than Officer Watkins had facts to aid officer Watkins. Finally the state quotes Sibron Vs. New York, 392 U.S. 40 (1968) for the proposition that flight "couple with specific knowledge on the part of the officer relating the suspect to the evidence of crime". This quotation too is misleading. In Sibron, the Officer heard noises at his own door as if someone was attempting entry.

> "When he investigated these noises he saw two men, whom he had never seen before in his 12 years in the building, tip toeing furtively about the hallway. They were still engaged in these maneuvers after he called the police and dressed hurriedly. And When Officer Lasky entered the hallway, the men fled down the stairs."

It was that level of information and activity observed by the officer, coupled with the fact that the suspects fled that led to probable cause in that case. Not just mere flight as is suggested by the state. However, there was no specific knowledge on the part of Officer Watkins to couple with the alleged flight to give rise to probable cause. In fact Mr. Moffitt did not run when "hailed" by an officer. There was evidence whatso ever that Mr. Moffitt was to stop or was specifically approached by the officer; Although the state has made a conscious effort to deceive this Honorable Court by going outside of the Motion To Suppression Hearing over into the trial to get the most damaging statement made after several dress rehearsals and then placing it before this Court" Here he is, here he is, here he is at that moment, Moffitt the defendant ran from the group. One of the other by standers

yelled to Watkins that's him he's got a gun (R.57). This was asserted after these assertions in the motion to suppression hearing. It was the other male that said he had a gun (R.39), yes, I believe his exact words was "there he goes, he's got the gun"(R.41) yeah, the other male that was standing in the group yelled thats him he's got a gun (R.52). He told me that there he goes. He's got a gun, and he took off running (R.53) I pulled up, they started yelling here he is, here he is, here he is and then he took off running they said he's got a gun (R.57) Its contrived situation like this that the "Welsh Vs. Wisconsin" decision was place into law to stop, the unlawful intrusion. The Alabama Supreme Court's Opinion does not narrow anything as is suggested by the State. That Court looked at all of the facts as to what officer watkins knew at the time he entered the home and concluded that no probable cause existed. Thatcourts opinion likewise did not change the standard to require the state to demonstrate a "prima facia showing of a crime". In fact that court properly stated that the test was whether a person of reasonable caution would believe that the action taken by the officer was appropriate. The Alabama Supreme Court correctly concluded that the officer did not have enought facts available to him to "support a reasonable belief that Mr. Moffitt had committed any crime." It is important to note that Mr. Moffitt was not arrested for Reckless Endangerment or Attempted Murder or any crime pertaining to a gun so therefore, the officers action is in direct conflict with his alleged belief (R.45). In Alabama the facts stated from official channels only constitutes a misdemeanor 13A-6-24 Code of Alabama 1975. Discharging a weapon is reckless endangerment

since there was no evidence presented at the scene and none through official channels then the crime of attempted murder becomes an irrational inference 13A-4-2 Code of Alabama, 1975 states an "attempt" to commit a crime consist of (3) elements (1) An intent to commit a crime: (2) performance of some overt act toward commission of the offense; and (3) the failure to consumate it's commission: Thus the courts frequently have talked of attempt as requiring more than preparation or requiring a "direct ineffectual act towards its (the crime) commission.

The Alabama Supreme Court decision correctly concluded the knowledge of "any crime" being a felony was not present in this case. The United States Supreme Court has held that "The Fourth Amendment prohibits the warrantless entry of a home, even with probable cause to arrest for a "minor" offense Welsh Vs. Wisconsin, 466, U.S. 740,753,104 S.Ct 2001 2009, 80 L.Ed.2d 732 (1984): Further the officer could not arrest the defendant for reckless endangerment anyway because they were not present when it occured. The fact that he allegedly fled is irrelevant because the police had no probable cause to believe a felony had been committed. The Alabama Supreme Court did not isolate one factor nor did they inject a "direct evidence statndard" as is suggested by the State but rather viewed the totality of the facts that officer watkins had before him and correctly concluded that he had no probable cause to enter the apartment this was not a narrow focus, but a review of all the evidence, or lack thereof. In fact the Honorable Supreme Court of Alabama followed this Honorable Court's directive so very close that they should be commended, and the State should be reprimanded for attempting to decieve this Honorable Court with trickery and dishonesty by

this petition for writ of certiorari being denied.

REASON FOR DENYING THE PETITION

The State in its selfish motives has overlooked an essential factor in dealing with this case and thats if a person has not been implicated in "any" "crime" then that person cannot be said to be a "suspect". Furthermore, if a person has not been hailed by an officer or approached by an officer then the fact that a person is saw running does not mean that he is running from that officer to justify pursuit, In fact considering the whole picture at the time of the incident without any identification of the reported shooter then Mr. Moffitt could have been the victim as well as the suspect. The officer stated that after everything had calmed down that he ask Edward Bryant did he ever see a gun and his reply was no I never saw it but Kenneth told me he had it (R.42D; However, Sedena another person at the scene stated it was Edward (her brother) who had the gun (R.80,105) This case comes down to the officer being over zealous and improperly trained and is not a chance to a direct evidence standard as is suggested by the State, because the alleged evidence would point only to a "Minor" offense thereby not raising to the level necessary to get around the Fourth Amendment Ban and this Honorable Court should deny Certiorari review.

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CONCLUSION

The ruling of the Alabama Supreme Court is so clearly in concert with prior case law that this Honorable Court should see fit to deny the Writ of Certiorari.

Kenneth E. Moffitt
Kenneth Moffitt Pro-se

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Response Brief upon the State of Alabama, Bill Pryor, by placing the same in the internal mail system postage prepaid and properly addressed this 22 day of November, 2002.

Respectfully Submitted,
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